IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CEDAR RAPIDS ASSOCIATION OF FIRE FIGHTERS, LOCAL 11 INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, Petitioner, vs. IOWA PUBLIC EMPLOYMENT BOARD, Respondent, CITY OF CEDAR RAPIDS, Intervenor,	NO. AA-2081 RULING ON PETITION FOR JUDICIAL REVIEW

On May 7, 1993, Petitioner's Administrative Appeal was heard before the Court. Petitioner appeared by its attorney, Charles E. Gribble. Respondent appeared by its attorney, Jan V. Berry. Intervenor appeared by its attorney, James H. Flitz. After hearing the arguments of counsel, reviewing the court file and briefs, and being fully advised in the premises, the Court now enters the following ruling.

STATEMENT OF THE CASE

Petitioner Cedar Rapids Association of Firefighters, Local 11, International Assocation of Firefighters [hereinafter "Association"] is an employee organization as defined by Section 20.3(4) of the Iowa Code. Intervenor City of Cedar Rapids [hereinafter "City"] is a public employer as defined by Section 20.3(11) of the Iowa Code. The Association has been certified by Respondent Iowa Public Employment Relations Board [hereinafter "PERB"] as the exclusive bargaining representative for certain employees of the City.

The Association and the City are parties to a collective bargaining agreement which was effective from July 1, 1991 through June 30, 1992. The provisions of that agreement which are the basis of the dispute in the present case are found in Article 11 of the agreement:

> 11.2a. The work hours for office workers, building maintenance, mechanics, fire prevention bureau, and training department will consist of 40 hours per week. The fire alarm operators will work three (3) regular shifts of 9 consecutive days on duty and three days off duty. One operator will work a swing shift changing hours every three (3) days working nine days in a row with three (3) days off. Regular starting and quitting times will be posted by the Department. Line Personnel will follow a 19 day rotating schedule of 53 hours.
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> 11.5b. An employee may have the privilege to change a workday with another employee on a different shift upon their mutual agreement and with the approval of the employee's company officer and district chief. In cases where an employee trades time with another employee, the Employer shall not be obligated to pay overtime on either trade unless more than regular scheduled hours are worked.
>
> However, men trading a workday must report for their scheduled tour of duty or have a replacement available. If a time trade is not properly consummated, the employees originally scheduled to work will lose pay for those hours not worked.

The Association and the City began negotiations on a successor collective bargaining agreement at an open meeting held October 1, 1991. At that meeting, the Association presented its initial bargaining position. The Association's position as to the provisions in dispute was that they be reincorporated without change.

The City presented its initial bargaining position at an open meeting held October 14, 1991. The City proposed changes to provision 11.2, but those changes did not include changing the 19

day rotating schedule of 53 hours for line personnel. The City proposed the following changes to provision 11.5b: 1) deleting "employee's company officer and district chief" from the first paragraph and replacing that language with "Chief or designee," 2) deleting "however" from the first line of the second paragraph and changing "a" to "an approved" in the second line of the second paragraph.

The first page of the Association's Initial Bargaining Position contained the following language: "All articles not listed to be changed will remain as they are. Local 11 reserves the right to modify its' open articles throughout the negotiating process." The first page of the City's Initial Bargaining Position states: "The City of Cedar Rapids reserves the right to make such additions, corrections, and amendments to this proposal as it may deem proper during the course of negotiations. Current language on all articles not specifically addressed."

The Association and City met at two bargaining sessions held October 21 and October 30 of 1991. No changes to the work schedule for line personnel were proposed by either party at either session.

At a bargaining session held November 18, 1991, the City proposed to change the work schedule of line personnel from a 19 day to 28 day rotating schedule. At that session, the City also proposed deleting provision 11.5b, which allows tradeoffs.

During July 1991, meetings on Team Building were held by the Cedar Rapids Fire Department. As a result, working committees were organized, including a Reorganization Committee. The

Reorganization Committee presented a progress report and recommendation to Chief Gorman on October 30, 1991. The idea for "Team Building" was Chief Gorman's and had no relationship to the collective bargaining process.

On December 9, 1991, the Association filed a prohibited practice complaint alleging that the City's proposals at the November 18, 1991 session eliminating work tradeoffs and changing the schedule for line personnel constitute bad faith bargaining and a violation of the requirement that the parties present all bargaining proposals to the other side in the presence of the public at the initial bargaining sessions.

On June 15, 1992, the Administrative Law Judge (ALJ) issued a proposed decision and order recommending that the complaint be dismissed.

On June 29, 1992, the Association filed a Notice of Appeal. On October 12, 1992, PERB filed its Decision on Appeal dismissing the complaint.

On October 20, 1992, The Association applied for re-hearing and on November 4, 1992, PERB denied the application. The Association then filed an Application for Judicial Review on December 2, 1992.

STANDARD OF REVIEW

Judicial review of the actions of an administrative agency is governed by the standards of Iowa Code section 17A.19(8). Mercy Health Center v. State Health Facilities Council, 360 N.W.2d 808, 811 (Iowa 1985). The court acts in an appellate capacity by reviewing the agency's decision solely to correct any

errors of law. Dubuque Comm. Sch. Dist. v. Public Employment Realtions Bd., 424 N.W.2d 427, 430 (Iowa 1988). Nearly all disputes in the scope of administrative law are won or lost at the agency level. Iowa-Illinois Gas & Electric Co. v. Iowa State Commerce Commission, 412 N.W.2d 600, 604 (Iowa 1987).

The cardinal rule of administrative law is that judgment calls are the province of the administrative tribunal and not of the courts. Mercy, 360 N.W.2d at 809. The agency's decision is final if it is supported by substantial evidence and is correct in its conclusions of law. Heatherly v. Iowa Dept. of Job Services, 397 N.W.2d 670, 670 (Iowa 1987). The agency's decision is supported by substantial evidence in the record when a reasonable mind would accept the record viewed as a whole as adequate to reach the conclusion. See Alcoa v. Employment Appeal Bd., 449 N.W.2d 391, 394 (Iowa 1989).

The possibility of drawing two inconsistent conclusions from the same evidence does not prevent the agency's decision from being supported by substantial evidence. Henry v. Iowa Dept. of Job Services, 391 N.W.2d 731, 734 (Iowa Ct. App. 1986). The court must not reassess the weight to be accorded to evidence; assessing the weight is within the exclusive domain of the agency. Burns v. Board of Nursing, 495 N.W.2d 698, 699 (Iowa 1993).

Interpretation of a statute is a question of law to be determined by the judiciary. West Des Moines Ed. Ass'n v. Public Employment Relations Bd., 266 N.W.2d 118, 124 (Iowa 1978). An agency's construction of the statutes and rules it administers is

entitled to weight by the court, but the agency may not make law or change the legal meaning of the common law or of a statute. Id. at 124-25.

CONCLUSIONS OF LAW

WHETHER THE CITY'S PROPOSAL AT THE FIFTH NEGOTIATING SESSION TO CHANGE THE WORK SCHEDULE OF LINE PERSONNEL AND TO ELIMINATE WORK TRADEOFFS WHEN SUCH WAS NOT PART OF THE CITY'S INITIAL BARGAINING POSITION IS A PER SE VIOLATION OF THE DUTY TO BARGAIN IN GOOD FAITH

The dispute in this case centers on the interpretation of section 20.17(3) of the Iowa Code which provides:

> Negotiating sessions, strategy meetings of public employers or employee organizations, mediation and the deliberative process of arbitrators shall be exempt from the provisions of [Iowa's Open Meeting law]. However, the employee organization shall present its initial bargaining position to the public employer at the first bargaining session. The public employer shall present its initial bargaining position to the employee organization at the second bargaining session, which shall be held no later than two weeks following the first bargaining session. Both sessions shall be open to the public and subject to the provisions of [Iowa's Open Meeting law]. Hearings conducted by arbitrators shall be open to the public.

Iowa Code sec. 20.17(3) (1993).

In essence, the Association's argument is that section 20.17(3) required the City to set forth all of the positions it would take during the negotiating process at the second negotiating session. (See Pet.'s Br. Supp. Pet. Jud. R. at 7-10.) Consequently, the City's proposals to change the work schedule of line personnel and to eliminate work tradeoffs which were introduced at the fifth rather than the second negotiating session constitute a per se violation of the duty to bargain in good faith. (Id. at 10-13.)

The City argues that all the words in the phrase "initial bargaining position" must be given effect so that parties negotiating a contract have the right to change their bargaining position on areas at issue even if the change occurs by way of making new proposals rather than eliminating proposals previously made. (City's Br. at 8.)

PERB argues that its decision that the City's conduct did not constitute a per se violation of the duty to bargain in good faith is correct. (See PERB's Br.) PERB states that courts have generally held that the determination as to whether a party's conduct is bad faith bargaining is made on a case-by-case basis. (Id. at 6-7.) Only limited types of conduct have been held to be per se refusals to bargain. (Id.) PERB reviews the type of conduct which has been held to be a per se violation of the duty to bargain in good faith and argues that the City's conduct does not fall into these categories. (Id. at 7-10.) PERB then notes that the Association failed to cite cases which support its position. (Id. at 10.) PERB also argues that it is important to note that it did not hold that "expanding" negotiations would never be a violation of the duty to bargain in good faith; it only held that it was not a per se violation of that duty. (Id. at 11.)

The issue of whether the requirement of section 20.17(3) that a party present its initial bargaining position at a session open to the public precludes a party from later making new proposals in an area opened to negotiation is a matter of first impression in the courts of Iowa. The only decisions which

interpret section 20.17(3) are PERB decisions holding that an employer's initial bargaining position must not only set forth the employer's proposed changes but must also respond to the employee organization's proposals. Davenport Community Sch. Dist. v. Davenport Ed. Ass'n, PERB No. 2458 (1983); Oelwein Community Ed. Ass'n v. Oelwein Community Sch. Dist., PERB No. 1593 (1980). These decisions also state that the parties must state their positions clearly so that the public can understand them. Although these decisions promote a policy of increasing public knowledge, they do not mandate that all positions a party might take must be presented in the party's initial bargaining position.

The legislative history of section 20.17(3) is of minimal help. The original version of this section exempted all negotiating sessions from Iowa's Open Meeting Law. Iowa Code sec. 20.17(3)(1975). The section was amended to its present wording in 1978; apparently as a result of Burlington Community Sch. Dist. v. Public Employment Relations Bd., 268 N.W.2d 517 (Iowa 1978), in which the court held that negotiation sessions would be closed unless both sides agreed otherwise. Id. at 524. The amendment to section 20.17(3) was itself an amendment to the bill passed by the legislature. See 67th General Assembly, House File 2074. Consequently, the explanation section of the bill and the two most relevant Interim Reports are silent as to the meaning or purpose of the amendment to section 20.17(3). See 67th General Assembly, House File 2074; Interim Reports to the 67th General Assembly, Collective Bargaining Administration, Open Meetings Law.

Apart from legislative history, there is nothing in the express language of Section 20.7(3) or the applicable provision of Section 20.10 which expressly limits negotiations to those proposals stated in the initial bargaining position. Indeed, use of the term "initial" evinces legislative recognition that bargaining positions may change.

In its Decision on Appeal, PERB noted, inter alia, that although, in general, good faith bargaining would require parties to present in their initial bargaining position all the positions they may take during the negotiating process, some flexibility is needed so that parties can address problems which surface during negotiations or respond to events which occur during the negotiating process such as court decisions or new legislation. (Decision on Appeal at 10.) This is a sound approach. Contract negotiations are by nature a fluid exercise involving much give and take. It does nothing to promote the policy of encouraging harmonious public employment relationships to treat initial bargaining positions as a rigid delimitation on what may be discussed. See Iowa Code sec. 20.1 (1993); Burlington Communitiy Sch. Dist., 268 N.W.2d at 524. The parties should be able, in good faith, to advance new proposals as a means of reaching accommodation. Surely this would seem to promote the public interest. On the other hand, the presentation of new proposals, particularly where they involve a new, previously undisputed subject, in bad faith or simply to avoid the public disclosure intended by Section 20.17(3) may be found to be a prohibited practice. This can only be decided with reference to the

circumstances of the particular case. Mere tender of a new proposal after the initial position is not, standing alone, such a manifest violation of the statute that it constitutes a violation of the duty to bargain.

The sole issue before PERB was whether the circumstances showed a per se prohibited practice. (Dec. on App. at 11 n.10) Having determined a per se rule should not apply, PERB concluded that the factual record, which consisted chiefly of a stipulation of facts, was insufficient to establish bad faith. (Id.) The Court agrees and does not understand Petitioner to argue otherwise on judicial review.

It follows that PERB's appeal decision should be affirmed.

RULING

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the agency action is AFFIRMED. Petitioner shall pay costs.

ROSS A. WALTERS, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

Dated this 27th day of September, 1993.

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METHOD OF DISPOSITION
JURY
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